UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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EKHAYA YOUTH PROJECT, INC.	*	
and	*	Cases 15-CA-155131 15-CA-162082
DALANA ZIPPORAH MINOR, an Individual	*	
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RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

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THE GENERAL COUNSEL'S CROSS-EXCEPTIONS

Respondent, Ekhaya Youth Project, Inc., submits this Answering Brief to the General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision (ALJD).

I. INTRODUCTION

On July 15, 2016, Judge Arthur J. Amchan issued his Decision finding that Respondent did not violate the Act in discharging Ms. Dalana Minor and Mr. Nicholas Davis and that Respondent's Rules about Professional Ethics, Non-Disclosure, Conduct that Causes Discredit to the Agency, and Protection of Personal and Confidential Information do not violate the Act, but adjudging that Respondent's Rules prohibiting "boisterous or disruptive activity in the workplace," "inappropriate familiarity among staff members," and "the disclosure of personnel information" do violate the Act. The ALJ did not reach an issue which he took under advisement at the hearing, namely, Respondent's opposition to the General Counsel's motion to amend the Complaint on the morning of the hearing to add a new charging party, Mr. Davis, and claims on his behalf, because of his determination that Mr. Davis was not discharged by Respondent in violation of the Act.

On September 12, 2016, Respondent filed its Exceptions and Supporting Brief herein objecting to the ALJ's Decision with respect to his finding that (1) Respondent's Rules prohibiting "boisterous or disruptive activity in the workplace," "inappropriate familiarity among staff members," and "the disclosure of personnel information" violated the Act; and (2) (and only in the event that the Board were to reverse the ALJ's decision that Respondent's discharge of Davis did not violate the Act) to re-urge Respondent's objection to the General Counsel's motion to amend the Complaint on the morning of the hearing which was not addressed by the

ALJ.

On October 11, 2016, the General Counsel filed its Cross-Exceptions to the ALJ's Decision which Respondent answers herein. The General Counsel addresses its Thirty-Three (33) Cross-Exceptions in groupings under Subsections (A) – (F) of its Section III Argument of its Supporting Brief and Respondent answers herein under the same format, Subsection by Subsection. Respondent's counter-statement of pertinent facts is set forth herein under Section II (E).

II. ARGUMENT

A. The ALJ correctly found that Respondent did not violate the Act by telling Ms. Minor not to have any conversation with staff or it could possibly affect the outcome of the investigation.

The General Counsel alleged in Paragraph 5(a) of the Amended Complaint that Respondent, through Mr. Branch, violated the Act by telling employees that they were prohibited from talking to each other and other staff.

As the ALJ correctly noted in his Decision (ALJD at 7:29-32), the General Counsel's Post-Hearing Brief on this allegation under Paragraph 5(a) of the Amended Complaint focused on Mr. Branch's following text to Minor after he informed her that she was on administrative leave pending further investigation: "Please do not have any conversation with staff or it could possibly effect [*sic*] the outcome of the investigation," G.C. Exh. 8.

The General Counsel's Argument at Section III (A) of its Brief in Support of Cross-Exceptions (at pp. 28-29), in which it addresses its Exceptions Nos. 1 and 33 objecting that the ALJ erroneously found that Respondent did not violate the Act as alleged in Paragraph 5(a) of the Amended Complaint, also focuses solely on Mr. Branch's text to Ms. Minor as set forth

above, just as did its Post-Hearing Brief.

The ALJ relied upon the Board's holding in *Caesar's Palace*, 336 NLRB 271 (2000), that the employer did not violate the Act by instructing employees not to discuss an ongoing drug investigation because the employer had a substantial and legitimate business justification which outweighed any infringement on employees' rights. ALJD 7:34-40. The ALJ also took note of *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), which is relied upon by the General Counsel in its Brief in Support of its Cross-Exceptions, and which the ALJ correctly observed is a rejection of blanket rules against discussions of all matters under investigation, regardless of the circumstances, which is not applicable here.

The ALJ then properly concluded from the testimony that Mr. Branch's explanation that conversations with other employees could in this case possibly affect the outcome of the investigation satisfied him that no violation had occurred since "the dangers of evidence being destroyed, fabricated and witness interference are obvious;" these dangers could be inferred from the circumstances; and these dangers are tacitly recognized by Federal Rule of Evidence Rule 615's requirement for a judge to order the sequestration of witnesses upon mere unilateral request of any party. ALJD 8:13-20.

The conclusion of the ALJ that Respondent did not violate the Act as alleged in Paragraph 5(a) of the Amended Complaint is supported in law and by the record and should be adopted by the Board.

B. The ALJ correctly found that Respondent did not unlawfully prohibit employees from discussing their salaries.

The General Counsel's Argument at Section III (B) of its Brief in Support of its Cross-Exceptions addresses its Cross-Exceptions Nos. 2, 8, 10, 19, 20, 21, and 33, which object that the

ALJ erroneously found that Respondent did not unlawfully prohibit employees from discussing their salaries as alleged in Paragraph 6 of the Amended Complaint.

General Counsel failed to go forward with any evidence that Respondent generally prohibited employees from discussing their salaries. The ALJ expressly found that "Respondent maintained no such rule." ALJD 9:13.

Respondent is required to protect against all unauthorized disclosure of personnel information because Article 1, Section 5, of the Louisiana Constitution guarantees to all persons, including Respondent's employees, security against "invasions of privacy.[1]" Respondent is obligated to protect the personnel information of each of its employees against disclosure without authorization of its employee. A reasonable employee would not construe Respondent's rule to prohibit the voluntary discussion among employees of their own wage or salary information, criminal history, and other personnel information.

In the case at hand, Ms. Minor's disclosure of confidential personnel information (salary information), was not joined in by other employees and was vehemently objected to by other employees. *Tr. pp. 248, 256, 308-11. Exhibits GC 12, 13, 14, and 15*. The Board has previously held that a Charging Party's communications were not drafted with or on the authority of other employees where, as here, the Charging Party's fellow employees found the communications "inappropriate and reported them to the manager." *Miami Jewish Health System*, 39 N.L.R.B 41 (2011); *Intermountain Spec. Abuse Treatment Ctr.*, 39 N.L.R.B. 39 (2011).

[1] La. Const. Art. 1, §5. Right to Privacy:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy. . . .

The ALJ expressly found that the General Counsel's reliance solely upon the conversation between Mr. Branch and Ms. Minor on June 18, 2015 (the same conversation that the General Counsel relies upon in its Brief in support of Cross-Exceptions in this regard) is misplaced because "Branch was discussing salary information that Minor became privy to in the course of her official duties and disseminated without the consent of other employees," and his prohibition against same did not violate the Act, citing *Ashville School*, 347 NLRB 877 fn.1 and *Clinton Corn Processing Company*, 253 NLRB 622 (1980). ALJD 9:13-19.

The General Counsel simply ignores the record and the ALJ's findings in its Argument.

The conclusion of the ALJ that Respondent did not violate the Act by prohibiting Minor from discussing salary information which she became privy to in the course of her official duties and without the consent of the employees is supported in law and by the record and should be adopted by the Board.

C. The ALJ correctly concluded that Respondent's Rules about Professional Ethics, Non-Disclosure, Conduct that Causes Discredit to the Agency, and Protection of Personal and Confidential Information do not violate the Act.

The General Counsel's Argument at Section III (C) of its Brief in Support of its Cross-Exceptions addresses its Cross-Exceptions Nos. 3, 4, 5, 6, 8, 11, and 33, which object that the ALJ erroneously concluded that certain Rules of Respondent did not violate the Act as alleged in Paragraph 7 of the Amended Complaint.

Initially, it should be noted that the ALJ concluded that three of Respondent's Rules did violate the Act, those prohibiting "boisterous or disruptive activity in the workplace," "inappropriate familiarity among staff members," and "the disclosure of personnel information." ALJD 14: 19-43. Respondent has objected to these conclusions of the ALJ in Respondent's

Exceptions to the ALJ's Decision.

Turning now to the remaining Rules challenged by the General Counsel, *Lutheran Heritage Village-Levonia*, 343 NLRB 646 (2004), should be considered.

In *Lutheran Heritage*, the Board affirmed the ALJ's finding that the employer's rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" "were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit Section 7 activity." *Id*., at p. 646.

The Board determined that "a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act" and held that:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Id., at p. 647. (Board's emphasis.)

Similarly, in the instant case, Respondent's challenged rules do not explicitly prohibit Section 7 activity.

Respondent respectfully submits that its challenge rules in question would not be construed by a reasonable employee to prohibit solicitation of union support or concerted activity aimed at wages, hours and/or working conditions, that is to say, to prohibit Section 7 activity.

In regard to Respondent's Rules regarding Professional Ethics, the first one addressed by the General Counsel in Section III (C) (i) of its Brief in support of its Cross-Exceptions is the rule against "inappropriate familiarity among staff members." The General Counsel mistakenly

argues this issue because the ALJ ruled in the General Counsel's favor on this issue and concluded that this Rule violated the Act, all as objected to by Respondent in Respondent's Exceptions.

Therefore, we are left with Respondent's Professional Ethics requirements that "staff will strive to work together as a cohesive team, supporting one another and administration at all times;" "staff will protect the privacy of other staff at all times;" and "staff will not give information of any nature about other staff to any unauthorized individuals."

Certainly, every employer should be able to encourage its staff to strive to work together as a cohesive team, particularly in Respondent's field of endeavor where peer services are being provided to children in need of services. And, it is incumbent upon Respondent to protect the privacy of staff and against the disclosure of information to unauthorized individuals in view of the guaranty to all persons, including Respondent's employees, to security against invasions of privacy by Article 1, Section 5, of the Louisiana Constitution as set forth above.

Due weight should be given to the ALJ's findings in this regard upon the entire record:

> *Particularly given the nature of Respondent's business*, I find that none of the other allegedly illegal rules [i.e., other than the three Rules identified above which the ALJ found violative of the Act and addressed in Respondent's Exceptions] violate the Act.

ALJD 14:45-46. (Emphasis added.)

With respect to Respondent's Non-Disclosure Rules which the General Counsel addresses in Section III (C) (ii) of its Brief in Support of Cross-Exceptions, the General Counsel addresses both the Rules protecting against disclosure of "financial information' and "personnel information," ignoring once again that the ALJ ruled in the General Counsel's favor on the Non-Disclosure of Personnel Information Rule and concluded that this Rule violated the Act, all as

objected to by Respondent in Respondent's Exceptions.

Therefore, the General Counsel's only real objection is to the ALJ's conclusion that the Rule protecting against disclosure of financial information did not violate the act.

The General Counsel, in its one-paragraph argument in this regard at p. 35 of its Brief in Support of its Cross-Exceptions, cites no support in law which prohibits a Rule against disclosure of the financial information of Respondent, its patients, or its staff or any basis for its assertion that the ALJ erred in this regard.

In regard to Respondent's Rule against conduct of such a nature as to bring discredit to the agency which the General Counsel addresses in Section III (C) (iii) of its Brief in Support of Cross-Exceptions, the General Counsel is engaging in the very speculation of every possibility of interpretation which the Board cautioned against in *Lutheran Heritage, supra*. Sure, any Rule could by some strained imagination be interpreted to conceivably prohibit concerted activity, but no reasonable employee would interpret a rule against conduct that discredits the agency to include a prohibition against concerted activity.

Finally, with respect to the Rule requiring protection of personal and confidential information which is addressed by the General Counsel in Section III (C) (iv) of its Brief in Support of its Cross-Exceptions, the ALJ correctly found upon the entirety of the record that:

> The rule requiring the protection of personal and confidential information regarding the company's system, employees, and youth and families appears quite reasonable since Ekhaya staff may have access to such information about its clients and employees. As to the latter, Respondent employs individuals with prior felony convictions.

ALJD 14:46 – 15:4.

And, again, it is incumbent upon Respondent to protect against disclosure of such

information in view of the guaranty to all persons, including Respondent's employees and patients, to security against invasions of privacy by Article 1, Section 5, of the Louisiana Constitution, and by the privacy provisions of HIPAA.

The conclusion of the ALJ that Respondent's Rules about Professional Ethics, Non-Disclosure, Conduct that Causes Discredit to the Agency, and Protection of Personal and Confidential Information do not violate the Act is supported in law and by the record and should be adopted by the Board.

D. The ALJ correctly concluded that Respondent's Continued Communication Policy does not violate the Act.

The General Counsel's Argument at Section III (D) of its Brief in Support of its Cross-Exceptions addresses its Cross-Exceptions Nos. 7, 8, and 11, which object that the ALJ erroneously concluded that Respondent's Continued Communication/E-Mail Policy did not violate the Act as alleged in Paragraphs 8(a) and 8(b) of the Amended Complaint.

The Complaint alleges that Respondent promulgated its Continued Communication or E-mail Policies to discourage employees from engaging in protected concerted activity. The only testimony on this issue from the Charging Party was that the email policy "potentially" had something to do with her termination because she complained about it. *Tr. p. 231*. There is absolutely no evidence that the E-mail policy had anything to do with the termination of the Charging Party, only speculation by the Charging Party.

The Policies of Respondent that are in question are found at GC-6 and GC-16.

GC-6, promulgated on June 18, 2015, provides as follows:

> Any emails forwarded and replied to by any Central Office Staff member must be carbon copied to the COO. Please be sure to

> follow the policy and procedure listed in this email. This policy is effective Thursday, June 18, 2015.
>
> In the event the email did not include the COO, please be sure to include the COO when replying. Responsiveness is required during the hours of 9 am – 6 pm and the promise to communicate will be exemplified via operation of the policy stated in this email.

Respondent's Central Staff employees, to whom the Policy applied, understood that Respondent's e-mail cc policy applied to e-mail which is to be conducted and is conducted on Respondent's e-mail system. As the Charging Party explained, emails are sent through Respondent's internal email system and the email addresses belong to Respondent; they are not the personal email addresses of Respondent's employees. The Charging Party understood that Respondent has a right to access the work emails and check them at any time through the host network. *Tr., p. 169.*

Respondent's COO, Mr. Branch, explained that Respondent maintains its own email account system with email addresses available to employees for the following purpose:

> The purpose and intent of this policy was so that I could identify the communications that were occurring internally and externally so I could identify the completion of tasks by staff persons and if possible prevent any miscommunication from occurring. Ms. Minor testified yesterday to contacting individuals for liability insurance, but we actually almost lost that coverage due to Ms. Minor along with several other business matters that she was tasked to conduct but did not conduct them as thoroughly as I directed.

Tr., p. 382.

The Email Policy was revised effective December 18, 2015, to provide as follows:

> The performance of your duties as an EYP Corporate Office employee which is conducted by e-mail must be conducted using EYP's e-mail system (ekhayafso.org and or your Ekhaya gmail account [first initial, last name eyp@gmail.com]) and not your

> personal e-mail. All e-mail which is sent by you and/or which is replied to or forwarded by you using EYP's e-mail system must be copied to the COO; in the event that an original e-mail is received by you on EYP's e-mail system and the COO is not copied, you must forward a copy of that e-mail to the COO and copy the COO with any response on EYP's e-mail system. Responsiveness is required during the hours of 9:00 a.m. - 6:00 p.m. and the promise to communicate will be exemplified via operation of the policy stated in this e-mail. The policy outlined in this e-mail ensures 'continued communication' throughout the daily operations of the organization. For Ekhaya Youth Project, this policy is named the Continued Communication Policy and carbon copied or cc is the alternate descriptive. This policy is effective the date of this e-mail.

GC-16; Tr., p. 383.

Respondent's Email/CC Policy does not infringe upon any employee protections under the Act.

Guard Publishing Company d/b/a/ The Registered Guard, 351 NLRB No. 70, correctly recognized that employees have no protected interest in the employer's e-mail system. It would seem to be an absurdity to hold that an employee has a protected interest in the employer's property.

Yet, it must be recognized that the Board in *Purple Communications, Inc.*, 361 NLRB 126, ostensibly overruled *Guard Publishing*, but with limitations and uncertainty as to what exactly may now be required.

It must also be recognized that *Purple Communications* is back before the Board after remand and a decision has not yet been rendered. It may be reasonably anticipated that this case will meet with further appeals. Hence, we do not yet have a final and definitive judgment in *Purple Communications*.

Moreover, *Purple Communications*, even as that decision stands today, has no real

bearing on the allegation in this case. *Purple Communications* merely held that employee use of the employer's email system for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.

Respondent's policy at issue does not ban employee use of Respondent's email system for statutorily protected communications on either working time or nonworking time. It merely requires that Respondent's Corporate Office employees perform their duties which require email on Respondent's email system and that the Chief Operating Officer be copied with all such email on Respondent's email system so that performance and productivity may be monitored and so that continuity of communications may be maintained.

Although employees may have a right, after *Purple Communications* reaches a final and definitive conclusion, to use an employer's email system for statutorily protected communications on nonworking times, the Board has never ruled that an employee has a *privacy* right within the employer's email system and there is no basis in law for recognizing such a right. Conducting statutorily protected activities on the employer's email system should be viewed as bulletin board employee postings on the employer's business premises. Just as the employer cannot be barred from its business premises so as not to see postings, an employer cannot be barred from its own email system and the employer has a legitimate need to monitor traffic over its email system. For privacy, it is not unreasonable to require that employees resort to the many available free and easy-to-install personal email accounts.

Respondent's email policy is not unlawful as the ALJ correctly concluded. ALJD 15:12-40.

E. The ALJ correctly concluded that Respondent's termination of the employment of Minor and Davis did not violate the Act.

The General Counsel's Argument at Section III (E) of its Brief in Support of its Cross-Exceptions addresses its Cross-Exceptions Nos. 8, 9, 12, 22, 23. 24. 25, 28, 29, 32, and 33, which object that the ALJ erroneously concluded that Respondent's termination of the employment of Minor and Davis did not violate the Act as alleged in Paragraph 9 of the Amended Complaint.

General Counsel has the burden of proof by a preponderance of the evidence "that the employee was engaged in protected concerted activity, that the employer knew of the activity and its concerted nature, and that the employee's protected activity was a motivating factor prompting some adverse action by the employer." *Manimark Corp. v. N.L.R.B.*, 7 F.3d 547, 550 (6th Cir. 1993).

The requirements of ***protected*** ***concerted*** activity, as must be demonstrated by General Counsel, are distinct. The Act protects concerted activity, not isolated conduct of a single employee even if taken for the goal of mutual aid or protection. *E.I. Du Pont De Nemours & Co. v. N.L.R.B.*, 707 F.2d 1076 (9th Cir. 1983). The employee "must act with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rockwell International Corp. v. N.L.R.B.*, 814 F.2d 1530, 1534 (11th Cir. 1987). "Purely personal griping does not fall within the scope of protected concerted activity." *Id.*, at 1535.

If the General Counsel establishes that protected concerted activity was a motivating or substantial factor in the employer's decision to terminate the employee, the employer has the burden of coming forward with some evidence to demonstrate that the same action would have

taken place in the absence of the protected conduct. *Manimark, supra; N.L.R.B. v. Wright Line*, 662 F.2d 899 (1st Cir. 1981).

In the case at hand, the General Counsel has failed to make a *prima facie* showing to support even the inference that protected concerted activity was a motivating factor in Respondent's decision to terminate Minor and Davis. Minor and Davis were not engaged in protected concerted activity and Respondent had no knowledge of any protected activity and its concerted nature. The record does not demonstrate that protected concerted activity was a motivating or substantial factor in Respondent's decision to terminate the employment of Minor and Davis. The record clearly and overwhelmingly demonstrates that the actual and motivating factors for the termination of Minor and Davis were, in the case of Ms. Minor, gossiping about the sexual orientation of Respondent's COO, disclosing confidential personnel information, sleeping at her desk, and boisterous conduct, and, in the case of Mr. Davis, gossiping about the sexual orientation of Respondent's senior management and failing to satisfy Respondent with respect to his pending criminal charges.

The original charge in this case does not even allege any specific concerted activity; it merely alleges generically that the Charging Party was discharged in retaliation for her "protected concerted activities." *Exhibit GC 1(a).*

Mr. Davis did not identify any protected concerted activity in which he was engaged. The only causes for his termination which he could identify at trial were the text messages with Ms. Minor about the alleged sexual orientation of Respondent's COO, the failure to satisfy Respondent regarding the pending criminal charges against him, and "for having a matter of opinion and not being willing to be submissive to the Kool Aid drinking." *Tr., p. 297.*

The only activity that the General Counsel and Ms. Minor can point to as alleged protected concerted activity of which Respondent would have had any knowledge are the text messages between Ms. Minor and Mr. Davis. *Exhibit GC 10.5 – 10.11*. However, gossip about the perceived sexual orientation of management and the erroneous perception of a problem between the COO and an employee are not protected concerted activity.

The General Counsel through a number of amendments to the Complaint, after the original complaint which simply parroted the Act with no actual facts, attempted to articulate concerted activity by Ms. Minor which was undertaken for the mutual aid or protection of employees of Respondent but could not find any evidence to support those amendments. The ALJ at hearing attempted to focus the parties on the text messages (*Tr. p. 203*) because it was so unclear as to what was actually being asserted as protected concerted activity, but there is simply no protected activity being conducted in the text messages between Minor and Davis.

Section 7 of the Act provides that an activity, to be protected, must be "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. There is no suggestion by General Counsel that any activity of Minor or Davis was for the purpose of collective bargaining. The "mutual aid or protection" clause of Section 7 protects employees who "seek to improve terms and conditions of employment." *New River Industries, Inc. v. N.L.R.B.*, 945 F.2d 1290, 1294 (4th Cir. 1991).

The text messages did not constitute "protected concerted activity" within the meaning of Section 7 of the Act because they did not relate to "terms and conditions of employment" but were inappropriate gossiping and mere personal griping about Respondent's COO. The "expression of criticism about management . . . is not a condition of employment that employees

have a protected right to seek to improve." *New River Industries, Inc. v. N.L.R.B.*, 945 F.2d 1290, 1294 (4th Cir. 1991). Even where "employees collaborate to criticize matters that are not related to mutual aid or protection of the employees; this activity is not 'protected concerted activity.'" *Id*. at 1295; *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F.2d 749, 751 (4th Cir. 1949). *See also, Media Gen. Op. v. N.L.R.B.*, 560 F.3d 181, 189 (4th Cir. 2009) (an "opprobrious ad hominem attack on a supervisor" was unprotected by the Act).

At most, Minor was just "venting" and perhaps motivated by frustration in the texting. Such conduct does not rise to the level of concerted activity for mutual protection. *Pub. Ser. Credit Union*. 39 N.L.R.B. AMR 33 (2011). "Purely personal griping does not fall within the scope of protected concerted activity." *Rockwell International Corp. v. N.L.R.B.*, 814 F.2d 1530, 1535 (11th Cir. 1987).

The employee "must act with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rockwell International Corp. v. N.L.R.B.*, 814 F.2d 1530, 1534 (11th Cir. 1987). Minor did not act on authority of other employees in texting nor did she bring any group complaints to Respondent's attention or intend to induce or prepare for group action.

In regard to Minor's disclosure of confidential personnel information (salary information), that, certainly, was not joined in by other employees and was vehemently objected to by other employees. *Tr. pp. 248, 256, 308-11. Exhibits GC 12, 13, 14, and 15*. The Board has previously held that a Charging Party's communications were not drafted with or on the authority of other employees where, as here, the Charging Party's fellow employees found the communications "inappropriate and reported them to the manager." *Miami Jewish Health*

System, 39 N.L.R.B. AMR 41 (2011); *Intermountain Spec. Abuse Treatment Ctr.*, 39 N.L.R.B. AMR 39 (2011).

The reason that the search of the record for protected concerted activity which might have been the motivating factor for the discharge of Minor and Davis is not productive is that the actual and only reasons for their discharge are abundantly clear. The record as a whole demonstrates the actual reasons for discharge and that the same action would have taken place in the absence of any protected concerted activity which General Counsel may be able to posit from the record.

The Supreme Court of the United States has expressly recognized that "the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." *N.L.R.B. v. Local Union No. 1229, Int'l Broth. Of Elec. Workers*, 346 U.S. 474 (1953). It is well settled that "the courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty." *Id.* Courts have held that when an employee "attacks" his or her employer, the attack will deprive the employee of Section 7's protection if it constitutes "insubordination, disobedience or disloyalty," which the Court made clear, is "adequate cause for discharge." *Id.* at 475; *Endicott Interconnect Tech., Inc. v. N.L.R.B.*, 453 F.3d 532, 537 (D.C. Cir. 2006) ("Section 7 of the Act . . . does not override the employer's authority to discharge for cause under Section 10(c) of the Act, which expressly provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been . . . discharged, or the payment to him of any backpay, if such individual was . . . discharged for cause."); *George A. Hormel Co. v. N.L.R.B.*, 962 F.2d 1061, 1064 (D.C.

Cir. 1992) ("Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty.")

Ms. Minor, in her grievance letter after being placed on administrative leave, clearly recognizes that the driving force of her discipline is the hurtful gossip in which she engaged about the perceived sexual orientation of Respondent's COO. *Exhibit EYP-4*.

As set out above, Mr. Davis clearly recognized that the causes for his termination were the offensive text messages with Ms. Minor about the alleged sexual orientation of Respondent's COO and the failure to satisfy Respondent regarding the pending criminal charges against him. *Tr., p. 297*.

Mr. Branch, Respondent's Chief Operating Officer, oversaw the termination of Ms. Minor and Mr. Davis. *Tr. pp. 47 and 48*. Mr. Branch identified Exhibit GC 9.1 as the Discipline Documentation Notice relative to Ms. Minor and testified that it describes the reasons for his decision to terminate Ms. Minor. *Tr. p. 50*.

In regard to Ms. Minor's sleeping at her desk, supported by the testimony of Vanessa Sumler, Respondent's Claims Manager (*Tr. 241-42*) and the internal investigation of Respondent's Corporate Compliance Officer, Nora Rowan (*Tr. pp. 319-20*), Mr. Branch testified that as a standalone incident this conduct would not have resulted in Ms. Minor's termination. *Tr. p. 368*.

In regard to Ms. Minor's talking in a loud and disruptive manner, supported by the testimony of both Mr. Branch and Ms. Rowan as to their personal knowledge (*Tr. pp. 51 and 120*), Mr. Branch also acknowledged that as standalone conduct this would not have resulted in Ms. Minor's termination. *Tr. p. 369*.

No, the weight of all of the testimony clearly shows that Ms. Minor was discharged for her inappropriate and offensive gossiping about the sexual orientation of the COO and for disclosing confidential personnel and salary information without the permission of the employees in question.

Ms. Rowan, Respondent's Corporate Compliance Officer, conducted an internal investigation which resulted in her recommendation for termination of Ms. Minor. *Exhibit GC-15*. She testified that Ms. Frazier, Quality Assurance/Quality Improvement Specialist, was interviewed and was upset that Ms. Minor had obtained Ms. Frazier's salary information only by reviewing payroll information in the course of an assignment and shared Ms. Frazier's information and the information of Hannah McNally and Kanedra Graves with other employees. *Tr. pp. 308-10*. Ms. Rowan also spoke with Mr. Branch about the texts between Ms. Minor and Mr. Davis (*Tr. pp. 314-18*) and found that they involved inappropriate and misinformed gossip. Exhibit GC-15. Based upon her investigation, as described in Exhibit GC 15, Ms. Rowan recommended that Ms. Minor's employment be terminated. *Tr. p. 321*.

Mr. Branch confirmed that he made the decision to terminate Ms. Minor's employment. *Tr. p. 365*. He stated that his decision was based in part on Ms. Rowan's investigation but also upon his discussions with Ms. Minor. *Tr. p. 366*. Mr. Branch testified that Ms. Minor confessed to him her inappropriate gossiping. *Tr. P. 374*.

Mr. Branch testified that on June 18, 2015, he was forced to leave a training that he was conducting in Houma, Louisiana, because of e-mails that he was receiving about problems being caused by Ms. Minor. *Tr. p. 370*.

On the drive back, Mr. Branch stated that he received a call from Kanedra Graves, who told him that Ms. Minor was disclosing in the office a conversation she was engaging in with Nicholas Davis by text messages concerning Mr. Branch's sexual orientation. *Tr. p. 371*. Ms. Graves then e-mailed to Mr. Branch a statement as to what she had just told him. *Tr. p. 372. Exhibit EYP-7*. Mr. Branch further testified that he found this gossiping about the sexual orientation of management by Ms. Minor and Mr. Davis offensive and disruptive to the office operations because everyone began to talk about it. *Tr. p. 375*.

Mr. Branch also testified that he oversaw the discharge of Nicholas Davis on June 22, 2015. *Tr. p. 357*. He stated that he was personally offended by this inappropriate gossip in which Mr. Davis participated as to Mr. Branch allegedly hating a certain staff member and wanting to be like that other staff member who is female. *Tr. 362-63*. As Mr. Davis testified, the CEO was upset "that this cancer would start from somebody so close to him," that "he doesn't' understand why people want to slander him or his name." and that his sexual orientation "was not up for discussion for employees." *Tr. p. 277*.

Mr. Branch confirmed that Mr. Davis was also terminated because he failed to provide adequate documentation required by the Louisiana Office of Behavioral Health as to the criminal charges pending against him. *Tr. p. 358*. As Mr. Branch explained, not all criminal charges or convictions preclude employment by Respondent, but the State Office of Behavioral Health (OBH), as a condition of Respondent's provider certification, requires documentation on file as to any convictions or pending charges. *Tr. p. 359*. Mr. Branch correctly testified that a letter from a paralegal (or even an attorney) that "the charges [which are not identified in the letter] would

not affect employment" does not suffice; OBH requires documentation as to the actual charges. *Tr. p. 360*.

It is undisputed that the employment of Ms. Minor and Mr. Davis was "at-will" of Respondent. Respondent could have discharged these two employees for no reason, and, certainly, for the reasons given. There is nothing in the Act which prohibits termination of Ms. Minor and Mr. Davis for the reasons given and the record as a whole does not in any way suggest that the reasons given were a pretext to circumvent the prohibitions of the Act. Moreover, this issue should not even be reached because the General Counsel has not even made out a *prima facie* case that protected concerted activity was a motivating factor in Respondent's decision to terminate the employment of Ms. Minor and Mr. Davis.

The ALJ obviously came to the same conclusions after hearing the witnesses over two days and, in accordance with the Board's established policy, his credibility resolutions should not be overruled or, they should be overruled only when the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951).

Specifically, the ALJ found as follows from the evidence which he determined to be credible:

> I find that the terminations of Minor and Davis did not violate the Act. Although Respondent's investigation and termination documents "muddy the waters," I find that the two were terminated for the text messages of June 18 and Minor's subsequent discussion of their content with fellow employees [*See*, ALJD 5:15-18: Minor did not deny discussing the texts with coworkers or gossiping about Branch's sexuality as set forth in the email of Kennedra Graves at Exhibit EYP-7]. [fn. 14: This case is somewhat unusual in that the termination documents give pretextual reasons for the terminations that could be violative.

> However, Davis' discussion with CEO Harris and Minor's with Branch make it abundantly clear that both Davis and Minor were fired for the substance of the text messages and Minor's discussion with her coworkers afterwards of the [alleged] relationship between Harris and Branch.] The conduct for which they were terminated was not protected. Assuming that some of this conduct was protected, they sacrificed that protection and demonstrated that they were "unfit for further service," either under the standard set forth in *NLRB v. Electrical Workers Local 1229* (Jefferson Standard), 346 U.S. 464 (1953); *Linn v. Plant Guards Local 114*, 383 NLRB 53 (1966).

ALJD 12:1-10.

The ALJ then outlined the basis upon which he reached his conclusions from these determined facts, all as set forth at ALJD 12:11 – 14:7. The ALJ correctly found, as argued above, that Minor and Davis were engaged in mere griping and summarized its conclusions as follows:

> Thus, to be protected by Section 7, conversation between two or more employees about wages, hours and working conditions must be seeking to initiate, induce or prepare for group action, *Triple Place Sports Bar & Grille*, 361 NLRB No. 31 (2014), slip opinion at p. 3. There is no basis for concluding that the text message exchange between Davis and Minor on June 18, 2015 meets this standard. Minor, as shown by Kendra Graves' email to VanShawn Branch, discussed these texts or showed them to other co-workers. There is nothing protected in her doing so. Their only objective was to disparage Branch.
>
> Davis did not engage in any other activities that could be deemed protected by the Act. Even assuming that he and/or Minor engaged in protected activity, I find they forfeited those protections. The texts and Minor's discussion afterwards were flagrantly disloyal and wholly incommensurate with any grievance she or any other employee had with Branch, *Five Star Transportation, Inc.*, 349 NLRB 42, 44-47 (2007) enfd. 522 F.3d 46 (1st Cir. 2008). Further, any concerted activity engaged in by Minor is outweighed by the employer's right to maintain order and respect, *NLRB v. Thor Power Tool Company*, 351 F.2d 584, 587 (7th Cir. 1965), *Southwestern Bell Telephone Company*, 200 NLRB 667, 700

(1972).

ALJD 13:5-20.

The conclusion of the ALJ that Respondent did not violate the Act in discharging Minor and Davis is supported in law and by the record and should be adopted by the Board.

F. In the event that the ALJ's Decision may be reversed or modified as to its finding that the termination of Nicholas Davis did not violate the Act and its dismissal of the Complaint allegations that Respondent violated the Act in terminating Mr. Davis, Respondent re-urges its opposition to the General Counsel's proposed amendment of the Consolidated Complaint on the morning of the hearing to add a charge of unlawful termination of Mr. Davis and to pray for remedies in connection with that new charge, all as set forth in Respondent's Exceptions, Exception No. 1.

The General Counsel's Argument at Section III (F) of its Brief in Support of its Cross-Exceptions addresses its Cross-Exceptions Nos. 13 and 33, which object that the ALJ erroneously failed to amend the Amended Complaint as requested by the General Counsel at trial.

The Office of the General Counsel proposed on the morning of the hearing in this matter to amend the Consolidated Complaint to add a charge of unlawful termination of Nicholas Davis (a gentleman who has sat on the sidelines since June 23, 2015, when the charging party, Ms. Minor solicited him and another terminated employee, Ms. McGrew to join Ms. Minor's claim, and even after he spoke with Board agents in October 2015, (Tr., p. 286) and to pray for remedies on his behalf in connection with that new charge. (Tr. 6-10).

Respondent objected to the proposed amendment on the grounds that it was untimely under Section 10(b), unjust under Board Rule 102.17, and a denial of procedural due process to require Respondent to defend a new charge with additional monetary exposure "on the fly," so to speak. (Tr. 13-17).

The Administrative Law Judge took the motion under advisement (Tr. 18) and Respondent and the General Counsel further submitted on the issue in their Post-Hearing Briefs.

The ALJ did not ignore the General Counsel's proposed amendment as asserted in General Counsel's Brief. The ALJ ultimately found that the termination of Mr. Davis did not violate the Act and dismissed the proposed Amended Complaint allegation that Respondent violated the Act in terminating Mr. Davis (ALJD 12: 1, 14: 6-7, 16: 7-8), which necessarily means that the ALJ allowed the amendment in the first instance so as to dismiss it. The ALJ states in a footnote that because of this alternative finding – the conclusion that Respondent did not violate the Act by discharging Davis – he was not addressing *Respondent's opposition* to the late amendment. (ALJD 12: fn. 13).

Respondent addresses this failure of the ALJ in Respondent's Exceptions, Exception No. 1, which is expressly pled only in the event that the ALJ's Decision as to Mr. Davis may be reversed or modified by the Board, and in which case Respondent re-urges and asserts it opposition to the General Counsel's proposed amendment to the Consolidated Complaint on the morning of trial with reference to Mr. Davis, which objection was not addressed by the ALJ.

III. CONCLUSION

For the above and foregoing reasons and based upon the entire record in this matter, Respondent respectfully submits that the General Counsel's Cross-Exceptions should be dismissed in their entirety and that the ALJ's Decision should be adopted by the Board, except as to those findings and conclusions to which Respondent has objected in Respondent's Exceptions and Brief in Support of Exceptions and that the ALJ's Remedy, Order and proposed Notice to Employees should be vacated and set aside to the extent as also set forth in Respondent's

Exceptions and Brief in Support of Exceptions.

Furthermore, in the event that the Board should reverse the ALJ's Decision that the termination of Mr. Nicholas Davis did not violate the Act and his dismissal of the Complaint allegation that Respondent violated the Act in terminating Mr. Davis, then Respondent respectfully submits that the General Counsel's motion to amend with respect to Mr. Davis should be denied, all as set forth in Respondent's Exceptions and Brief in Support of Exceptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Respondent's Answering Brief to the General Counsel's Cross-Exceptions was filed electronically through the Agency's website on October 24, 2016, which shall constitute service upon the Board, and that a copy has been served by electronic mail this same date on the following:

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